

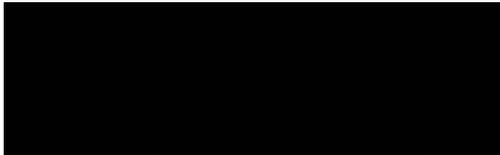
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U.S. Citizenship  
and Immigration  
Services

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FILE:



Office: TEXAS SERVICE CENTER

Date:

JUL 30 2008

SRC 07 148 52200

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate at the University of Massachusetts Medical School (UMMS), Worcester. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states, in pertinent part:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the “prospective national benefit” [required of aliens seeking to qualify as “exceptional.”] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

*Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien’s past record justifies projections of future benefit to the national interest. The petitioner’s subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term “prospective” is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines “exceptional ability” as “a degree of expertise significantly above that ordinarily encountered” in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

On the Form I-140 petition, the petitioner indicated that he “[i]s conducting three projects related to different cancers, involved in leukemia, glioblastoma and apoptosis mechanism at the forefront of cancer biology aiming to develop new drugs to treat cancers.” The intrinsic merit of cancer research is beyond dispute, and the petitioner’s research has national scope through publication of the petitioner’s findings in major scholarly journals. At issue is whether the petitioner stands apart from other cancer researchers to an extent that would justify the special added benefit of a national interest waiver.

In a “Research Statement” accompanying the initial filing, the petitioner described his past and present work:

I spent three years in Shanghai Medical University in studying the effect of a chemical isolated from a Chinese herb on antagonizing lung cancers. . . . The compound I studied damaged lung cancer cells through inhibiting protein kinase C signaling pathways providing a potential clinical treatment for lung cancer. . . .

I spent 7 years [at the] State University of New York [SUNY] Downstate Medical Center at Brooklyn in studying a critical growth factor in cancer development. Fibroblast growth factor-2 (FGF-2) is an essential growth factor required for many cell types including cancer cells. . . . My research, advised by [REDACTED] who is an excellent cancer biologist, demonstrated [for the] first time in the world that nuclear FGF-2 regulates cell growth directly through stimulating ribosome biogenesis, a key step in controlling cell proliferation. This finding not only shed light on the molecular mechanisms involved in mediation of cell dividing but also provide[d a] theoretical basis for developing drugs for cancer therapy. . . .

I chose [REDACTED] laboratory at University of Massachusetts Medical School to pursue my scientific research. . . . My current research in his lab includes investigating different apoptotic pathways involved in leukemia and glioblastoma. . . . The only way to overcome and cure those dangerous diseases is to understand how they form and develop. One of the key mechanisms for the un-limited growth of cancer cells is their ability to escape . . . programmed cell death or apoptosis. . . . [O]ther colleagues in [REDACTED]s lab have [previously] identified a new apoptotic pathway governed by intracellular iron which is mis-regulated in leukemia cells. Nonetheless, this pathway is still not completely illustrated and its relationship to drug target discovery is still unclear.

. . . My recent research has uncovered several new components involved in this pathway which provides more potential targets for leukemia therapy. . . . The most pronounced finding in my recent work is that a cocktail with an inhibitor of a signaling pathway and Gleevec is able to induce cell death in leukemia cells with chemo-resistance. Thus to those leukemia patients with chemo-resistance, a novel potential therapy can be applied. The manuscript about these findings is under preparation.

There is no evidence that the aforementioned manuscript has appeared in print in the sixteen months that have elapsed since the petitioner first submitted the above introductory statement.

Several witness letters accompanied the initial filing. We shall consider examples of these letters here. UMMS Professor [REDACTED] stated that the petitioner "has made major contributions in a surprisingly short period of time" at Prof [REDACTED]s laboratory, but he appears to have identified only one specific finding. Prof [REDACTED] credited the petitioner with the finding that "a combination of Gleevec and a MAPK signaling pathway inhibitor successfully destroys tumor cells but not normal cells," which "has opened up new avenues of investigation to develop . . . novel strategies for the treatment of chronic myeloid leukemia."

Associate Professor at SUNY Downstate Medical Center, credited the petitioner with "several extremely impressive scientific achievements" during his time in [REDACTED] laboratory. Dr. [REDACTED] emphasized the petitioner's findings with regard to FGF-2.

Associate Professor [REDACTED] of the University of Southern California, who has collaborated with Dr. [REDACTED] and served on the petitioner's doctoral thesis committee, stated that the petitioner's "achievements provide pharmaceutical industries the molecular basis to develop anticancer drugs."

Professor [REDACTED] of the University of Alabama at Birmingham stated: "I don't know [the petitioner]. However, his research work is very impressive." Prof. [REDACTED] discussed the petitioner's work with FGF-2 and asserted: "These pioneering studies provide a theoretical basis for investigating possible treatment methods for cancer." Prof. [REDACTED] offered no specific comments regarding the petitioner's more recent work in Prof. [REDACTED]'s laboratory at UMMS.

[REDACTED] Associate Professor at Columbia University, stated: "Although I have not collaborated or directly communicated with [the petitioner], I am familiar with his scientific publications. . . . [The petitioner] is a highly accomplished scientist who has already reached the top level of his field of research." Like Prof. [REDACTED] praised the petitioner's research with FGF-2 but said little about the petitioner's subsequent work at UMMS.

Information included in the initial filing showed that the three articles co-authored by the petitioner and Prof. Chirico had been cited two, five, and 13 times, respectively. Four of these 20 citations (including both citations of the twice-cited article) were self-citations by the petitioner or his co-authors. The initial submission showed no citation of the petitioner's earlier work, and no publication of subsequent work.

On September 4, 2007, the director issued a request for evidence, instructing the petitioner to "demonstrate how your achievements are more significant/noteworthy than others in the field and are above that normally attained by somebody at your current level."

In response to the director's request, the petitioner submitted additional witness letters, most of which focused on the petitioner's work with FGF-2 at SUNY Downstate Medical Center, which ended in 2005, two years before the letters were written. An exception is a letter from [REDACTED] Assistant Professor at [REDACTED] Institute of Science and Technology, whose "research group has been in collaboration with Dr. [REDACTED] laboratory." [REDACTED] stated that the petitioner had discovered the mechanism by which the drug Gleevec "inhibits the growth of leukemic" (*sic*). [REDACTED] did not indicate how much notice this finding had attracted outside of the petitioner's own circle of collaborators.

The petitioner submitted copies of the petitioner's published articles and unpublished manuscripts, and updated citation information showing that the aggregate total number of independent citations of two of the petitioner's articles had increased from 18 to 23. The cited articles derive from the petitioner's student work.

The director denied the petition on December 21, 2007. The director acknowledged the intrinsic merit and national scope of the petitioner's work in cancer research, and noted the positive reaction to the petitioner's work with FGF-2, but the director found that "[n]one of the evidence of record establishes that the self-petitioner has accomplished anything more significant than other capable members of her [*sic*] profession holding similar credentials and conducting similar research."

On appeal, counsel cites three claimed errors in the director's decision, and asserts that these errors "evidenced that denial officer even did not know or care whose cases he/she reviewed and denied [*sic*]." Specifically, counsel states that the director provided the wrong date for the request for evidence, the wrong

alien number (A-number), and the wrong gender pronoun in reference to the petitioner. Regarding the first error, the director actually cited two different dates for the request for evidence; the second cited date is correct. The reference to the incorrect date appears to be an editing error rather than evidence that the adjudicator reviewed the wrong file.

With regard to the issue of the A-number, we note that the petitioner filed the Form I-140 petition with the Texas Service Center, and then, some months later, he filed a Form I-485 adjustment application with the California Service Center. It appears that each Service Center assigned an A-number to the petitioner upon receipt of the respective forms. Because the petitioner filed the Form I-140 before he filed the Form I-485, the A-number relating to the Form I-140 has priority and is the correct number. Counsel, on appeal, incorrectly asserts that the number assigned by the California Service Center is the correct number. The “wrong alien number” to which counsel refers is, in fact, the number assigned by the Texas Service Center and printed on the jacket of the file containing the present record of proceeding. Computerized records relating to the I-485 reflect an “A-Number Change” on January 8, 2008.

Finally, counsel notes that the director used the feminine pronoun “her” instead of the masculine pronoun “his” in reference to the male petitioner, and speculates that the decision therefore refers to some other individual altogether. To use counsel’s exact words: “We would like to point it again that officer use ‘her’ here. So the comments might not against [REDACTED]” The claimed errors in the director’s decision are not substantive, adjudicative errors, but rather grammatical or typographical errors (except for the reference to the petitioner’s A-number, which is not an error at all). The director’s specific reference to the petitioner’s research “on fibroblast growth factor-2” dispels counsel’s speculation that the adjudicating officer reviewed the wrong record of proceeding. We reject counsel’s contention that the adjudicator “dealt with this case with careless attitude [*sic*]” to an extent that compromised the integrity of the decision.

Counsel claims that the director failed to consider “strong evidence testifying that [the petitioner’s] publications are all noteworthy and has [*sic*] already had huge impact on the field.” The petitioner submits a new letter, attributed to Prof. [REDACTED] indicating that the petitioner has made discoveries “for the first-time . . . in the world.” It is not clear how a given finding could qualify as a “discovery” if it is already known to the scientific community (i.e., if it has already been “discovered” at least once before). Therefore the “first-time” qualification, while technically true, does not impart significant weight to a given “discovery.” It is to be expected that scientific researchers seek new information, rather than simply confirming existing discoveries.

The latest letter under Prof. [REDACTED] name indicates that the petitioner has conducted pioneering research relating to the drug Gleevec, and that the petitioner “is preparing the manuscript and will submit this paper with his new findings out very soon.” This paper appears to be the same paper that was first described as “in preparation” at the time of filing in April 2007, and was later submitted in manuscript form in response to the request for evidence. The record continues to be devoid of evidence that the petitioner’s work in Prof. [REDACTED] laboratory, which began three years ago, has yielded any finished product that has either been published or accepted for publication.

Some witnesses have attested that the petitioner’s work is especially significant, but the record lacks sufficient objective evidence to lend persuasive support to such claims. The record reflects, at best, a burst of interest in

the now-completed work with FGF-2 that the petitioner conducted during his doctoral studies. While the petitioner's past findings are clearly useful, the record does not establish that these findings have been particularly influential.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

**ORDER:** The appeal is dismissed.